

Hon. Benjamin H. Settle

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

DAVID LEWIS OLIVER AND BARBARA  
ELLEN OLIVER,

Plaintiffs,

v.

OCWEN LOAN SERVICING, LLC;

Defendant.

Case No. 3:12-cv-05374-BHS

**DEFENDANT OCWEN LOAN  
SERVICING, LLC'S REPLY TO  
PLAINTIFFS' RESPONSE TO  
DEFENDANT'S MOTION TO DISMISS**

[Fed. R. Civ. P. 12(b)(6)]

**NOTE ON MOTION CALENDAR:  
AUGUST 3, 2012**

COMES NOW Defendant Ocwen Loan Servicing, LLC, ("Ocwen") and  
replies to Plaintiffs David Lewis Oliver and Barbara Ellen Oliver's (the  
"Plaintiffs") Response to Motion to Dismiss as follows:

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiffs' opposition, like their complaint, is nothing more than conclusory

1 arguments which do not cure the patent defects of each of the claims asserted  
2 against Ocwen.

3 Moreover, Plaintiffs concede that they cannot allege the required elements  
4 to maintain the fourth and ninth claims and do not even address the arguments to  
5 the third and seventh claims. For the reasons set forth herein and in the moving  
6 papers, Ocwen's Motion to Dismiss should be granted and Plaintiffs' complaint  
7 dismissed with prejudice.

## 8 **II. LAW AND ARGUMENT**

### 9 **A. Ocwen is Not a "Debt Collector".**

10 Plaintiffs argue that because the debt was in default when the loan was  
11 service transferred to Ocwen in November of 2006, Ocwen is a debt collector  
12 citing *Schlosser v. Fairbanks Capital Corporation*. *Schlosser v. Fairbanks*  
13 *Capital Corporation*, 323 F.3d 534 (7<sup>th</sup> Cir. 2003). Plaintiffs' argument fails  
14 because Ocwen acquired the debt to service the mortgage loan and has been doing  
15 so since 2006.

16 As a preliminary matter, Plaintiffs' opposition states that paragraphs 5 and  
17 6 allege that the loan was in default when the Ocwen began servicing the loan.  
18 All Paragraph 5 alleges is that "Plaintiffs were unable to make all of their  
19 payments due to the lien holder." It does not actually allege that the loan was in  
20 default.

21 *Schlegel v. Wells Fargo Bank, N.A.*, declined to follow *Schlosser v.*  
22 *Fairbanks Capital Corporation*, stating that "the Act [FDCPA] is aimed at debt  
23 collectors who might have 'no future contact with the consumer and often are  
24 unconcerned with the consumer's opinion of them.' 'Where there is an ongoing  
25 relationship, creditors arguably have an incentive to treat debtors with honesty

1 and respect.’ ” *Schlegel v. Wells Fargo Bank, N.A.*, 799 F. Supp.2d 1100 (N.D. of  
2 Ca. 2011).

3 As in *Schlegel*, here there is an ongoing relationship, as evidenced by the  
4 allegations that Ocwen has been servicing Plaintiffs’ loan since 2006. Plaintiffs  
5 admit that Ocwen has been servicing the loan since 2006. [Complaint ¶ 6].  
6 Plaintiffs’ also admit that when their Chapter 13 Plan was completed on February  
7 2, 2011, Plaintiffs’ loan was current. [Complaint ¶ 9]. The claims asserted by  
8 Plaintiffs are all based on actions taken after Plaintiffs’ Chapter 13 plan was  
9 completed and the loan was current. [Complaint ¶ 9-14]. Plaintiffs do not allege  
10 that Ocwen acquired their defaulted debt “solely for the purpose of facilitating the  
11 collection of debt for another” therefore, Plaintiffs fail to plead that Ocwen is a  
12 debt collector.

13 Even assuming Ocwen is a “debt collector”, Plaintiffs’ opposition does not  
14 cure the defect that Plaintiffs’ boilerplate allegation that “Defendants acts of  
15 collecting from Plaintiffs violates numerous provisions of the Fair Debt  
16 Collection Practices Act including, but not limited to 15 U.S.C. §1692d; 1692e;  
17 1692e(2); 1692e(5); 1692e(8); 1692e(10); 1692e(12); 1692f(1); 1692f(5); and  
18 1692f(6)” is not sufficient to state a claim against Ocwen. Plaintiffs have failed  
19 to allege any acts taken by Ocwen in violation of the sections cited. Conclusory  
20 allegations of law are not taken as true for purposes of a motion to dismiss.  
21 *Pareto v. Federal Deposit Ins. Corp.*, 139 F. 3d 696, 699 (9th Cir. 1998).  
22 Plaintiffs’ FDCPA claim fails to allege a claim against Ocwen and should be  
23 dismissed with prejudice.

**B. Plaintiffs' Second Claim Fails Because Plaintiffs Have Not Alleged a Viable Claim for Violation of RESPA.**

Plaintiffs' opposition does not address the fact that Plaintiffs' complaint does not articulate any supporting facts other than those pled in a conclusory manner to further their claim, i.e. "Defendant's actions violated numerous provisions of RESPA including, but not limited to, 12 U.S.C. 2605(d); 2605(e)(1)(A); 2605(e)(2); and 2605(e)(3)." There are no facts articulated to demonstrate how Plaintiffs came to these conclusions and what actions were taken in violation of each of these provisions of RESPA. Plaintiffs' claim pursuant to RESPA is insufficiently alleged and should be dismissed with prejudice.

**C. Plaintiffs' Opposition Does not Address the Deficiencies in Their Claim for Violation of Washington Consumer Protection Act**

Plaintiffs' opposition does not address the arguments relating to the claim for Violation of Washington Consumer Protection Act based on RCW 19.86.030 which states that "Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful."

As set forth more fully in the moving papers, Ocwen is the servicer of Plaintiffs' mortgage loan. There is no factual scenario that would result in Ocwen restraining Plaintiffs' trade. Therefore, Plaintiffs' third claim should be dismissed with prejudice.

**D. Plaintiffs Concede that the Claim for Violation of the Automatic Stay is not Proper**

Plaintiffs' opposition concedes that the Violation of Automatic Stay is only proper in the Bankruptcy Court. Therefore, the fourth claim should be dismissed

1 with prejudice.

2 If the Court is inclined to review Plaintiffs' fourth claim, the claim still  
3 fails because, as set forth more fully in the moving papers, Plaintiffs have not  
4 alleged any facts that Ocwen violated the stay.

5 **E. Plaintiffs' Fifth Claim for Conversion Still Fails to Allege Any**  
6 **Facts that Would Give Rise to a Claim of Conversion**

7 Plaintiffs' two sentences in opposition to Ocwen's Motion to Dismiss the  
8 claim for conversion fails to address the fact that Plaintiffs' have failed to allege  
9 any of the necessary elements of a claim for conversion.

10 The essential elements of a conversion cause of action are: (1) The  
11 defendant willfully interfered with a chattel; (2) The defendant acted without  
12 lawful justification; (3) The plaintiff was entitled to possession of the chattel; and  
13 (4) The plaintiff was deprived of such possession. 29 Wash. Prac., Wash.  
14 Elements of an Action § 8:1 (2011-2012 ed.). None of these elements are alleged  
15 in the complaint. Therefore, the claim for conversion should be dismissed with  
16 prejudice.

17 **F. Plaintiffs' Claim for Breach of Contract Still Fails**

18 Plaintiffs' argument that "the only logical conclusion is that defendant is in  
19 privity of a contract with Plaintiffs and therefore is subject to this action" does not  
20 change the fact that Plaintiffs' complaint fails to set forth the required elements  
21 for a breach of contract claim against Ocwen.

22 A cause of action for damages for breach of contract is comprised of the  
23 following elements: "1. That the plaintiff and defendant made a valid contract; 2.  
24 That the contract was breached by defendant; 3. That plaintiff performed; and 4.  
25 That plaintiff suffered damages as a consequence." 29 Wash. Prac., Wash.

1 Elements of an Action § 7:1 (2011-2012 ed.).

2 None of the elements are alleged in Plaintiffs' complaint. Plaintiffs have  
3 not alleged the existence of a contract or any terms of the alleged contract. Nor  
4 have Plaintiffs alleged that that they performed or were excused from  
5 performance under the contract. A blanket allegation that Ocwen's acts  
6 constitute a breach of contract without pleading the essential elements of the  
7 contract is insufficient to maintain a claim for breach of contract. Accordingly,  
8 Plaintiffs' sixth claim be dismissed with prejudice.

9 **G. Plaintiffs' Opposition Does not Address the Deficiencies in Their**  
10 **Claim For Contempt**

11 Plaintiffs' opposition does not address the argument that Plaintiffs' seventh  
12 claim for contempt fails because it does not allege a single fact to support the  
13 claim. There are no allegations to what the actions were that were in direct  
14 violation of the plan, therefore, the claim for contempt should be dismissed with  
15 prejudice.

16 **H. Plaintiffs' Eighth Claim For Declaratory Relief Under Fed. R.**  
17 **Bankr. Pro. 3012 Is Improper**

18 Plaintiffs concede in their opposition that the court that has jurisdiction to  
19 here a claim under Fed. R. Bank. Pro 3012 is the Bankruptcy Court. Therefore, it  
20 is improper in this action. Moreover, pursuant to Fed. R. Bankr. Pro. 3012 the  
21 proper procedure to have the Court determine the amount of a lien is by noticed  
22 motion. Therefore, Plaintiffs' request for declaratory relief establishing the lien is  
23 not proper and the claim should be dismissed with prejudice.

1           **I. Plaintiffs Concede that Ocwen does not Owe Plaintiffs a**  
 2           **Fiduciary Duty**

3           Plaintiffs concede that they do not have a fiduciary relationship with  
 4 Ocwen, therefore, Plaintiffs cannot allege the essential elements of fiduciary duty  
 5 cause of action. Plaintiffs' argument that "when defendant instructed another  
 6 party to foreclose in violation of its fiduciary duties it aided and abetted the  
 7 violation of the trustee's fiduciary duties and therefore is liable for those  
 8 violations" is nonsensical and without merit. The truth of the matter is there was  
 9 no fiduciary relationship between Ocwen and Plaintiff. Accordingly, Plaintiffs'  
 10 breach of fiduciary duty claim fails and should be dismissed with prejudice.

11       **III. CONCLUSION**

12           For the above-stated reasons as well as those set forth in the moving  
 13 papers, Defendant Ocwen respectfully request the Court to grant the Motion to  
 14 Dismiss.

15  
 16 Dated August 2, 2012

**HOUSER & ALLISON**  
 A Professional Corporation

/s/ Robert W. Norman  
 Robert W. Norman, Jr.  
 Attorneys for Defendant,  
 Ocwen Loan Servicing, LLC

**DECLARATION OF SERVICE**

The undersigned declares as follows:

On August 2, 2012, I served the foregoing document on the following individual(s) through the CM/ECF System to the e-mail addresses listed below or by U.S. Mail, Postage Prepaid:

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